SUBJECT INDEX.

TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 118

HAMILTON S. WALLACE
Appellant
vs.
THE UNITED STATES
Appellee

On Appeal from U. S. Court of Claims.

BRIEF.

STATEMENT OF FACTS.

The appellant served as an officer of the U. S. Army continuously from October 29, 1898, and as Colonel, from April 26, 1912, until February 11, 1918, when he was summarily dismissed by the President. The order and notice of dismissal did not inform appellant of the nature of any charges upon which his dismissal was based. He was in the Quartermaster Corps from August 24, 1912, until dismissal.

Within six months after his dismissal (on July 16, 1918) appellant made, in writing, an application for trial by Court Martial, setting forth, under oath, that he had been wrongfully dismissed. On September 14, 1918, his application for trial was refused by the Secretary of War and appel-

lant so informed. No court martial has been convened at any time to try the appellant upon any charges under which he was dismissed, and on February 5, 1919 (six months after the receipt by the War Department of his application for trial) appellant reported for duty under Section 1230 Revised Statutes, U. S. The War Department refused and still refuses to recognize his claim to be an officer of the United States Army.

On March 1, 1918 (18 days after appellant's dismissal) the President made the following nominations in the Army:

> "Quartermaster Corps,
>
> "To be Colonels:
>
> "Lieutenant Colonel Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.
>
> "Lieutenant Colonel Richmond McA. Scofield, Quartermaster Corps, with rank from February 23, 1918."

These officers were confirmed by the Senate on March 8, 1918, and said appointments filled the complement of 21 officers allowed in that grade.

The question at issue in this case is whether appellant was legally removed from his office by the order of dismissal, or superseded therein by the filling of the complement of officers of his grade by said appointments of Smith and Scofield, inasmuch as neither of said appointments referred to him or his dismissal in any way.

The appellant contends that under the provisions of Section 1230 Revised Statutes, U. S., he is entitled to his office, and sues for his salary from the date of his wrongful dismissal. The court below dismissed the petition on the ground that said statute is not operative, but was repealed by an Act of Congress approved August 29, 1916, and that the President had the power to summarily dismiss appellant independent of any statute; and anyway, appellant was superseded in his office by the filling of the complement of

Colonels allowed by law, when Smith and Scofield were appointed.

The case appears to be the first one to be presented to this court which directly involves Section 1230, Revised Statutes, U. S. The claim of appellant depends upon the validity of said statute which he contends is in full force and effect, and cannot be fairly construed without granting him the relief prayed for herein.

ASSIGNMENT OF ERRORS.

The errors assigned include the following:

In dismissing appellant's petition and rendering a judgment in favor of the United States.

In failing to render a judgment in favor of appellant.

In holding that the summary dismissal by the President of an officer in the Military Service operates to entirely separate him from said service and creates a vacancy in that office.

In assuming that the mere filling of the complement of officers allowed in any grade in the U. S. Army operates to displace an officer of that grade who has been summarily dismissed by the President.

In holding that Section 1230 of the Revised Statutes is not operative.

In holding that Section 1230 of the Revised Statutes is superseded by the 118th Article of the Articles of War enacted as a part of the Act of August 29, 1916 (39 Stats. 651,669), notwithstanding that said article is identical in terms with Article 99 of Section 1342 of the Revised Statutes.

In holding that an officer of the U. S. Army summarily dismissed by the President is thereby entirely disconnected with the Army, and is not subject to military law, and therefore may not be tried by Court Martial upon his ap-

plication made in accordance with Section 1230 of the Revised Statutes; and that in such a case the trial by court martial having been regularly applied for and refused, said officer can regain his office only by an original appointment by and with the advice and consent of the Senate.

In holding that the President has power to finally dismiss an officer of the U. S. Army without court martial independent of any statute.

SUMMARY OF ARGUMENT.

In the following argument it is contended that:

1. Appellant is entitled to his office of Colonel, U. S. Army, by virtue of the provisions of Section 1230, Revised Statutes, U. S.

2. The enactment of the Act of August 29, 1916, (article 118 of the present Articles of War) did not repeal Section 1230, Revised Statutes, or in any way change the laws of the United States governing the dismissal of officers of the U. S. Army.

3. Section 1230, Revised Statutes, U. S., does not create a novel situation, and its operation does not present any real difficulty in any contingency which may happen.

4. Section 1230, Revised Statutes, U. S., operates to nullify and render void, under certain circumstances, a summary dismissal by the President of an officer in the U. S. Army, and in such a case it is not necessary that such officer be again nominated and confirmed by the Senate in order to be restored to his office.

5. An officer of the U. S. Army, summarily dismissed by the President, is subject to military law under Section 1230, Revised Statutes, U. S., which Statute prescribes the tribunal to try him, and provision has been made by law for the execution of the award of the court martial in such

a case.

6. The President alone has no power to dismiss an officer of the U. S. Army except such as has been conferred by Statute.

7. The President *alone* has no implied power to dismiss an officer of the U. S. Army under the Constitution of the United States as an incident to the power of appointment.

8. An officer is not superseded in his office where, as in the case at bar, the Senate fails to concur in the appointment of someone named as his successor.

9. The President has no implied power to dismiss an officer of the U. S. Army under his Constitutional power as the Chief Executive.

10. The President alone has no authority to dismiss an officer of the U. S. Army because of the terms of the commission issued to such officer.

11. The President has no authority to dismiss an officer of the Army by virtue of his Constitutional relation as Commander in Chief.

12. Conclusion. The decision of this Court must be in favor of appellant, and he is entitled to a judgment for the amount set forth in finding of fact No. VII of the Court below.

ARGUMENT.

1. APPELLANT IS ENTITLED TO HIS OFFICE OF COLONEL, U. S. ARMY, BY VIRTUE OF SECTION 1230, REVISED STATUTES, U. S.

Said Section 1230 provides that

> "When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court martial, to try such officer on the charges on which he shall

have been dismissed. And if a court martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President, shall be void."

The findings of fact which have been adopted by the Court below are to the effect that Col. Wallace was summarily dismissed by authority of the President (finding IV), that he did make, in writing, an application for trial, setting forth, under oath, that he had been wrongfully dismissed, and that the court martial was not convened within six months from the presentation of such application for trial (finding V). **And the Statute, by language which cannot be given any other meaning declares that in such a case "the order of dismissal of the President shall be void."**

Section 1230 R. S. is designed to protect officers in their constitutional rights. It is simple in its terms and reasonable and just in its operation. The summary dismissal by the President is effective unless the officer protests his innocence. It is void if the officer protests his innocence and the War Department shall refuse a trial. If a trial is granted, the officer is dismissed or restored in accordance with the verdict of the court martial. The President may desire to reinvestigate a case in the event of an officer's denial of guilt, and so he is given six months after the application for court martial within which to determine whether the accused shall be tried upon the charges against him, or be restored to his office.

The dismissal of an officer carries with it disgrace, financial loss, and the ignominious ending of an honorable career, and the issuance of such an order by the President is a grave responsibility to a subordinate whose rights he is charged by law and his oath of office to protect. If we were in the unhappy state where the acts of the President could

not be questioned, but were conclusive, we would be imputing to him an infallibility which is to be expected in no earthly officer or tribunal. In this case, however, the President's power was used and abused by his subordinates, and the injustice which was done can only be imputed to him by virtue of legal presumptions. The record does not show that he personally refused the court martial. However, both the unjust dismissal and refusal of court martial are legally chargeable to him.

Aside from the power conferred upon the President alone, *in time of war*, embodied in Article 118 (formerly Article 99) of the Articles of War, an officer of the U. S. Army may not be dismissed except upon conviction by a General Court Martial upon one or more of certain specified offenses which are enumerated in the Articles of war. (See Section 1229, Revised Statutes.)| In military parlance the word "dismiss" implies punishment, and when a dismissal is ordered by the President it should be by way of punishment for some specific offense which, presumably at least, can be stated in the form of charges on which the accused might be brought to trial by General Court Martial. The failure to specify any charge in the order or notice of dismissal of appellant, coupled with the refusal of a trial, when applied for, are sufficient to condemn the dismissal as an arbitrary abuse of power, and warrant the assumption that the dismissal was based upon reasons which were utterly insufficient to justify it.

It is our boast that a day in court is guaranteed to all men. It does not at all comport with our ideals or institutions to condemn men without a hearing, or to refuse an accused any opportunity to show his innocence. And so every intendment, every assumption, every presumption, and every doubt should be resolved in favor of an officer dismissed without trial, and against the confirmation of a summary dismissal. Manifestly Congress never intended

the power of dismissal to be exercised in any such manner as was done in this case. It was a travesty upon justice and a farce, at variance with constitutional rights which military and civil courts are required to protect.

The grant of power carries with it the responsibility to exercise it justly and with the intent to accomplish the purposes of the grant. The President may dismiss an officer in time of war for any reason deemed by him sufficient, but in the exercise of that power he is charged with the responsibility of acting justly. Even if his actions are based upon the best of intentions he may in some cases do wrong, because he is human, and to correct a wrong done by him, intentionally or otherwise, certainly is not repugnant to our institutions, or against the dignity of his office, or contrary to the Constitution, or foreign to purposes of our courts.

Section 1230 R. S. specifically grants to an officer who has been wrongfully dismissed, as in this case, the opportunity to defend his good name, uphold the honor of his service, and vindicate the truth. The said Section was intended to insure that an order of summary dismissal should be based upon good and sufficient grounds. It provides, in effect, that if an officer is dismissed without trial the order is effective unless, and until, he shall protest under oath that it is wrongful; if a court martial, after trial, shall render a verdict in accordance with the order, it is effective; but if the officer not only protests but shows to a court martial that the dismissal was wrongful, the order is void—as it should be; or if he is refused an opportunity to show that the dismissal was wrongful, the said order is void—as it should be.

The decision of the Court of Claims in this case is the first one of any court (so far as we have been able to discover) which questions the validity or the manifest purpose of Section 1230 of the Revised Statutes, first enacted as Section 12 of an act of Congress (Chap. 79) approved

March 3, 1865 (13 Stats. at L., p. 489). The Constitutionality of its provisions was affirmed by the Attorney General on August 6, 1866 (*12 Opp. Atty. Gen., 4*), and the Court of Claims construed it and cited it with approval in the case of *Neaton vs. the United States* (*18 Ct. Cl. 434*). This Court referred to it as subsisting law in the case of *Blake vs. United States* (*103 U. S. 227*); but both the *Neaton & Blake* cases were decided upon some other point.

It is not surprising that there are no decisions of courts which directly involve Section 1230, Revised Statutes. The power of summary dismissal is one which should be exercised only under extraordinary circumstances, and in the clearest cases. Since 1866 it has been permitted in time of war only, and therefore the periods have been limited during which it was possible to exercise the power. It speaks well for the officers of the army and navy and for the Presidents who have administered the law, that this seems to be the first case in which a court has been required to pass in judgment upon its exercise. But there can be no question as to the validity of the law which limits and prescribes the effect of a summary dismissal by the President in time of war. By another statute (Section 1229, Revised Statutes, U. S.,) the President has been denied the power to summarily dismiss an officer in time of peace, and there have been many decisions in which that law has been upheld. Certainly if Congress has the power to deny altogether the exercise of the power of dismissal in time of peace, there can be no question of its power to regulate or limit the effect of dismissal in time of war. As to the validity of the act of Congress depriving the President of the power to dismiss in time of peace, see

United States vs. Perkins, 116 U. S., 483.
Keyes vs. U. S., 109 U. S., 336.
Blake vs. U. S., 103 U. S., 227.
McElrath vs. U. S., 102 U. S. 426.

Mullan vs. U. S., 140 U. S., 240.
Crenshaw vs. U. S., 134 U. S., 99.
Hartigan vs. United States, 196 U. S., 196.
United States vs. Andrews, 240 U. S., 90.
Street vs. United States, 133 U. S., 299.
Fletcher vs. U. S., 26 C. Cl., 541.
Garrick vs. U. S., 24 C. Cl., 264.
Harmon vs. U. S., 23 C. Cl., 132.

2. THE ACT OF AUGUST 29, 1916, (39 STATUTES 651, 669) DID NOT REPEAL SECTION 1230 OF THE REVISED STATUTES, OR CHANGE IN ANY PARTICULAR THE LAW GOVERNING DISMISSALS OF OFFICERS OF THE U. S. ARMY.

The Court below erred in holding that the Act of August 29, 1916, repealed Section 1230 of the Revised Statutes (Transcript, page 10). On the contrary, by its very terms, said act of Congress is an amendment of Section 1342, Revised Statutes, and does not even refer to Section 1230. So far as Article 118 is concerned, the **amendment consists in changing the number of said article from 99 to 118!** The language of Article 118 of the present articles of war, quoted by the court below as having the effect of repealing Section 1230, R. S., is identical with the language of Article 99 of Section 1342 of the Revised Statutes which it supersedes. Said Article 99 was enacted at the same time, and as part of the same general law as Section 1230. They are statutes *in pari materia*, and it is fundamental that they would have to be construed together so as to give effect to each, but a reading of them will convince anyone that they are not inconsistent with each other, and it is not necessary to annul or modify any provision of either section to give full force and effect to all of the provisions of the other section.

Surely it is sufficient to state the proposition that the enactment of Article 99 of Section 1342 did not render

nugatory the provisions of Section 1230, enacted **at the same time, and that the same language reenacted at a later date could have no greater or different effect than in the original statute.**

U. S. vs. Freeman, 3 Howard, 556.

3. SECTION 1230, R. S., DOES NOT CREATE A NOVEL SITUATION AND DOES NOT CREATE ANY REAL DIFFICULTY IN ITS ADMINISTRATION IN ANY CONTINGENCY CREATED THEREBY.

The Court erred in holding that there is a doubt as to the validity of Section 1230, because of a supposed difficulty in determining what would be the status of the dismissed officer during the period between the time of his dismissal and his restoration under the Statute, and his status if he fails to apply for court martial. (Transcript, page 10.)

It is submitted that the situation created is not novel. In every case in which a court martial renders a verdict of dismissal of an officer, and it is approved by the officers ordering said court, the same situation exists, for under the powers conferred by the Articles of War the President may commute the sentence. If the President does commute the sentence the officer is restored to the rolls, but unless and until the President, or the reviewing authority, does approve the finding or commute the sentence, the dismissed officer is not entirely separated from the service. After the President has approved the sentence of dismissal by a court martial he has lost jurisdiction of the case, and the officer is finally separated from the service. But the status of an officer dismissed without trial is not final unless he shall fail to apply for trial by court martial within a reasonable time. The status of such an officer during the period in which he may apply for trial under Section 1230 is analagous to the status of a litigant in court where an order *nisi* has been passed, an interlocutory

decree has been rendered, or a decree final in its nature, is still in the bosom of the Court, or there is the right of appeal from a final decision of a Court. In every one of those instances the status of the litigant is not final, notwithstanding the terminology of the order or decree which may have been promulgated. Even a *permanent injunction* may be vacated. These contingencies are all well understood and exist by virtue of laws creating them, and the Statute under consideration in plain terms creates a similar situation with respect to an officer dismissed by the President without court martial. The filing of the application for trial in such case is in the nature of an appeal from the President's order, and has the same effect.

In the case of either the nomination or dismissal of an officer by the President, the result is not always the same. If Congress is in session when a nomination is made the appointee may not act at all until the Senate has confirmed the apointment. If Congress is not in session when the nomination is made the appointee may act until the Senate rejects the appointment or until the end of the next session of the Senate after the nomination was made. So in the case of the dismissal of an officer of the Army or Navy. If it is based upon the verdict of a court martial, it is final and complete when the President approves it. If it is a summary dismissal it is not final and complete until the officer allows a reasonable time to elapse without asking for a court martial, or a court martial is convened and awards dismissal or death, or the Senate concurs in the dismissal by consenting to the appointment of some other officer nominated by the President to supersede him.

The order of dismissal does not *ipso facto* separate an officer from the service—(it depends upon the circumstances under which it was issued) any more than the order of appointment, *ipso facto*, confers any authority on the appointee to act—(it depends upon whether Congress is in session). An appointee during the recess of Con-

gress may act before confirmation, and the fact that such a person has been inducted into an office implies the permanent filling of the office, but such may not be the case. The appointment ends after the end of the next session of the Senate, unless the Senate confirms.

To promulgate an order of dismissal implies that the officer affected is finally separated from his office, but such may not be the case. The Articles of War grant court martials the right to dismiss, and the orders are effective upon approval of the officer ordering the court martial, but the President may commute such a sentence.

Words do not always have the effect that their terms imply, but in all cases the courts must give to the words the meaning intended by the persons who used them, and so the mere use of the word *dismissed* does not mean final separation from the service in the Act of 1865, now Section 1230, or Article 118 of the Articles of War, because it is perfectly plain that Congress, in passing these various statutes intended that in some cases an officer dismissed might apply for court martial, and if he was refused a trial that he should be restored. The courts of justice are charged with the carrying out of these provisions and may not give the Acts of Congress a different effect than Congress intended, merely because of the novelty of the situation created; or because of the general meaning of words which are used therein. There can be no question but that Congress intended by enacting Section 1230 R. S. that an officer dismissed under such circumstances as in the present case, should have the right to apply for a trial, and that when such an application was filed as in the present case, the officer would be restored at the end of six months unless a court martial was convened to try him within said period.

4. SECTION 1230, R. S. U. S., OPERATES TO NULLIFY, UNDER CERTAIN CIRCUMSTANCES AN ORDER OF DISMISSAL.

BY THE PRESIDENT, AND IN SUCH A CASE IT IS NOT NECESSARY THAT THE DISMISSED OFFICER BE AGAIN NOMINATED AND CONFIRMED IN ORDER TO BE RESTORED TO HIS OFFICE.

Because of its error in assuming that the effect of any order of dismissal was finally to separate an officer from the service the Court below concluded that an officer summarily dismissed could regain his office only by a new appointment by and with the advice and consent of the Senate. (Transcript, page 10.) The law does not impute any such force or effect to an order of dismissal without trial. On the contrary, by the very terms of Section 1230, which is of equal force with the various articles of Section 1342, an order of dismissal by the President is void under certain circumstances. The power of summary dismissal is conferred by Article 99 of Section 1342, and the effect of summary dismissal is limited by Section 1230. The extent of a power can be none other or greater than that prescribed by the law conferring it, and it is immaterial that the law conferring the power and prescribing and limiting its effect are contained in different sections of the same body of laws.

Moreover, Congress has declared in the Act of July 29, 1868 (15 Stats. at Large, p. 125), now Section 1228 of the Revised Statutes, that

> "No officer of the Army who has been or may be dismissed from the service by the sentence of a general court martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate."

This Statute, also, is subsisting law, and its very plain and obvious implication is that an officer of the Army summarily dismissed (as in the case at bar) need not be reappointed in order to be restored to his office.

Surely it cannot be seriously maintained that Congress, in granting power to the President to summarily dismiss

an officer in time of war, could not also prescribe that such an order of dismissal would be void if it was subsequently shown to be wrongful. But if the order of dismissal had the effect *instanter* of separating the accused from the service, so that he would have to be reappointed and reconfirmed in order to be reinstated, as maintained by the Court below, there would be no difference in the effect of a dismissal which is in all respects complete and one which is void.

To be sure, Section 1230, R. S., U. S., does not limit the power of the President to dismiss, but merely limits the *effect* of a summary dismissal. The Statute has no operation or force except when the President has summarily dismissed an officer of the army, but the order of dismissal has no other or greater effect than the law imputes to it. The officer is not separated from the service by the dismissal unless the dismissal, by the terms of the law, produces such a result; and there is no vacancy in the office unless, by the terms of the Statute, the officer did completely sever his relations with it; and a new appointment and confirmation are not necessary unless the officer severed his relations with the office. If the facts are such that, by the terms of the Statute, the order of dismissal by the President was *void* the effect of the said order was not to separate the officer from the service, nor to create a vacancy in the office, in which event a new appointment and confirmation are not necessary. Indeed, if the order of dismissal was void, it was of none effect, and it is as if the said order never had been issued. The word "void" as used here has no other meaning.

29 Am. and Eng. Enc. L., p. 1065, and cases cited.

Does this Court doubt the power of Congress to enact that an officer shall not be dismissed without a trial, or if dismissed without a trial his dismissal shall be void?

In Article 118 of the present Articles of War (Art. 99 of

Sec. 1342 R. S.) Congress has enacted that an officer shall not be dismissed except by Court Martial or by authority of the President, and Section 1230 R. S. provides that if an officer is dismissed by the President, he may have a trial by court martial upon the charges upon which he was dismissed if he applies for it and declares under oath that he was wrongfully dismissed. It further provides that if an accused officer is refused such trial he shall be restored as if the order had never been issued. Is there anything unconstitutional in that? On the contrary, it is directly confirmatory of the rights guaranteed by the Fifth Amendment to the Constitution.

5. AN OFFICER SUMMARILY DISMISSED BY THE PRESIDENT IS SUBJECT TO MILITARY LAW, AND THE LAW HAS PRESCRIBED THE TRIBUNAL TO TRY HIM AND PROVIDED FOR THE EXECUTION OF ITS DECISION.

Nor is there any merit in the further objection by the Court below, that the dismissal by the President would render an officer ineligible to the trial by court martial under Section 1230, R. S., U. S., because such officer would not then be amenable to military law. (Transscript, page 10.)

This objection is also based upon the assumption that the order of dismissal *ipso facto* separates an officer from the service, which we have shown above to be an error. But the objection would not be valid in any case. Davis' Military Law (cited by the Court below in support of the rule) refers to the right of a dismissed officer to a trial by court martial under Section 1230, (p. 527) and he cites an exception to the general rule on page 58. As a matter of fact, the present Statutes of the United States provide that several classes of persons who are not in the military service may be tried by courts martial. Thus:

Paragraph ("a") of Article 2 of the present Articles of

War (approved August 29, 1916) provides that in addition to those who have entered the military service "all other persons lawfully called, drafted, ordered into, or to duty, or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same" are subject to military law.

Paragraph ("d") of said Article 2, provides that "all retainers to the camp and all persons accompanying or serving with the armies of the United States * * * though not otherwise subject to these articles" are subject to military law.

Paragraph ("e") of said Article 2, contemplates the trial by court martial of "all persons under sentence and adjudged by courts martial" and that would give jurisdiction to try a person while serving a sentence twenty years after he had been discharged from the military service.

Paragraph ("f") of said Article 2 confers jurisdiction to try by court martial "all persons admitted into the Regular Army Soldiers Home at Washington, D. C.," which would include any of the ex-soldiers therein who had been discharged as far back as the Civil War.

Article 32 of said Articles of War confers jurisdiction upon courts martial to punish any person, whether or not in the military service, who happens to be present at a court martial and who uses menacing words, signs or gestures in its presence.

Article 81 of said Articles of War confers jurisdiction upon courts martial to try any person, whether or not in the military service who relieves the enemy with arms, ammunition, etc., or who knowingly harbors, etc., an enemy, and this article allows a court martial to sentence such a person to death.

Article 82 of said Articles of War provides that any person whether in the military service or not who, in time of war, shall act as a spy, etc., shall be tried by General

Court Martial and upon conviction thereof suffer death.

It will thus be noted that the "general" rule is subject to several exceptions, and Section 1230 R. S. is one of such exceptions and its validity has never been questioned.

The remarks in the decision regarding the failure of Section 1230 R. S. to provide for the execution of a sentence of court martial, if convened, and the doubts of the court whether the act really means a "court martial" or "a court of inquiry," or "some other body authorized by an order of the President whose finding can go to the officer's record or make him eligible to reappointment," (Transcript, page 10) are all sufficiently answered by calling attention to the fact that it was not necessary that Section 1230 of the Revised Statutes should provide for the execution of the sentence of the court martial granted therein, since that was provided for in Section 1342 of the Revised Statutes. Further, that the "court martial," and not some other nebulous body is specified in the act to take jurisdiction of the case in the event that a dismissed officer asks for a trial. The *court martial*, is a constitutional court, established by Congress, and so is the *Court of Inquiry*, but the jurisdiction of the two is entirely dissimilar, and the scope of the jurisdiction of each is prescribed by Section 1342 R. S., which as stated elsewhere herein has been amended by the Act of Aug. 29, 1916. Congress alone, by virtue of Article III, Section 1, of the Constitution, is empowered to establish courts of the United States, and the President has no authority to constitute any of the sorts of tribunals suggested in the decision.

Ex Parte Milligan, 4 Wall, 2.

It is not deemed necessary to answer the objection of the Court below, which is based upon statements made during debate in the Senate upon the provisions of the Act of March 3, 1865, later re-enacted as Section 1230, R. S. (Transcript, page 9). So far as the application of the

statute to the facts in this case are concerned, the meaning of the statute is perfectly understandable and does not admit of two interpretations. When there is no obscurity in the effect of the law or the object aimed at by the legislature, it is not permitted for a court to inquire into the motives of the legislature in order to defeat the law itself.

Denn vs. Reid, 10 Peters, 524.

Sedgwick on Construction, p. 295.

It is considered, therefore, that there is no merit whatever in any of the objections of the Court below to either the validity or the meaning of Section 1230, Revised Statutes.

6. THE PRESIDENT ALONE HAS NO AUTHORITY TO DISMISS AN OFFICER EXCEPT SUCH AS HAS BEEN CONFERRED BY STATUTE.

The Court below erred in holding that there is any authority in the President to dismiss an officer of the army except such authority as is conferred by the Revised Statutes and Statutes enacted since such revision as shown herein. The Court held that the President has constitutional authority independent of statutes to remove officers and has cited in support of said doctrine *McElrath's Case; Ex Parte Hennen; Gratiot's Case; Mimmack's Case;* and the *Blake Case.* (Transscript, pp. 7, 8.)

It is true that the Court of Claims in its decision in *McElrath's Case* (12 C. Cl. 201) did enunciate such a doctrine, but on appeal to the Supreme Court the case was decided upon the ground that McElrath had been superseded by the appointment of his successor, by the President by and with the advice and consent of the Senate. The Supreme Court was not persuaded by the Court of Claims that the President alone had authority to dismiss independent of statute, as to which the Supreme Court stated "we express no opinion," but the Court found that the President had authority to dismiss McElrath under the

Act of July 17, 1862, which was then in force. (102 U. S., 426.) Said act was amended by the Act of March 3, 1865, now Section 1230, R. S., U. S.

There are *dicta* in the decision in the case of *Ex parte Hennen* (13 Peters, 230) to the effect that the President, as an attribute of the executive power conferred by the Constitution, is vested with the power of dismissal, but the case was decided upon another ground and one which is inconsistent with the said *dicta*. Hennen was a clerk of a United States court and had been removed by the Judge of said court, and the Supreme Court found that the judge had the power to remove the clerk under the implied power confered by the Statute Law as an incident of the judge's power of appointment. In other words, the decision establishes this simple proposition and no other; namely, that the power of removal, in the absence of all constitutional or statutory regulation, is incident to the power of appointment, which is, of course, an entirely different proposition from the doctrine that the power of removal vests in the President as an incident to his office as chief executive of the Government. In Hennen's case, under the latter theory, Hennen could not have been removed by the judge, who belongs to the judicial and not the executive branch, but the power of removal would have been vested in the President, whereas the court decided that the power of removal was in the judge.

In *Gratiot's Case* (1 Ct. Cl., 258) there are *dicta* to the effect that the President has constitutional authority to remove an officer and in support of the theory *Story on the Constitution* and not a judicial decision is cited. However, the case was decided on the ground that Gratiot had been dismissed in conformity with the Act of January 31, 1823 (*3 Stats., 723*), and the decision refers to two separate charges specified by the President under said act. More-

over, the President's order of dismissal was predicated upon said Act. It is significant that while Mr. Story enunciated the doctrine cited in the *dicta* in the Gratiot case, it would appear that he did so on the basis of statute law as it then existed with reference to civilian officers (which is considered in another part of this brief). He refers to said doctrine as "constituting the most extraordinary case in the history of the Government of a power conferred by implication in the executive by the assent of a bare majority in Congress which has not been questioned on many other occasions." (2 Commentaries, 1543.)

There is nothing said in the *Mimmack Case*, 97 U. S., 426, about the constitutional authority of the President to dismiss an officer, nor did the case involve the dismissal of an officer. The decision states that prior to July 13, 1866, the President had power to dismiss. Why that particular date? Because that is the date of the approval of an Act of Congress (*14 Stats., 92*) repealing the Act of July 17, 1862, which authorized and requested the President to dismiss officers for any reasons deemed sufficient by him. Manifestly it was true that by virtue of statutory enactment from July 17, 1862, until July 13, 1866, the President had authority to dismiss. The decision of the Court in the *Mimmack Case* was to the effect that the claimant had resigned and his resignation had been accepted and that under those circumstances the claimant was out and the President alone had no authority to restore him.

With respect to the *Blake Case* (103 U. S., 227) it should be borne in mind that that case, as well as the *Mimmack Case*, did not involve any order of dismissal. Blake resigned. His resignation was accepted and the President, by and with the advice and consent of the Senate appointed some one else to succeed him. Blake claimed that when he resigned he was insane and that for that reason his

resignation was invalid as such, but the Court held that it was not necessary to pass upon the question of the resignation inasmuch as the power of superseding an officer was by the Constitution impliedly conferred as an incident to the power of appointment, and that Blake had been superseded by the appointment, by and with the advice and consent of the Senate, of his successor. There are *dicta* in this case to the effect that the President has authority, independent of statute, to dismiss, and certain opinions of the Attorney General are cited. By an examination of the opinions of the Attorney General referred to in the Blake case it will be found that in some of them it affirmatively appears that the dismissal referred to was in conformity with the statute law then existing. In other opinions it does not affirmatively appear that the dismissal was contrary to the statute law then existing. In some cases it is not shown that the Senate did not concur in the dismissal, and in several of the said opinions the Attorney General has failed to recognize the difference between the President's full power to "nominate" and his qualified power to "appoint," and that the concurrence of the Senate is necessary in the exercise of the power of appointment of an officer of the Army.

It is not considered necessary here to analyze separately the several opinions referred to in the Blake Case. It is significant that at that late day, 1881, no judicial decision was cited in support of the doctrine, and it is believed that the value of said opinions as authority for the doctrine is minimized by the fact that when most of them were rendered the President had statutory authority (as will be shown herein) to remove an officer under certain circumstances. It is fundamental that the acts of a public officer are conclusively presumed to have been done under the law which authorized them. An examination of the following statutes will show that Congress has repeatedly legislated with reference to the power to remove an officer.

The first exercise of Congress of its constitutional power to make rules and regulations for the governing of the Army was the Act of May 30, 1796, entitled "An Act to Ascertain and Fix the Military Establishment of the U. S." (1 Stats., 483). Section 18 of said act recognized the existence of courts martial and provided that "the sentences of general courts martial, in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer shall, with the whole of proceedings in such cases respectively, be laid before the President of the United States, who is hereby authorized to direct the same carried into execution or otherwise as he shall judge proper (485).

The first act of Congress for the government of the Navy was the Act of March 2, 1799 (1 Stats., 709), which, among other things, prescribed the punishment for certain offenses, including in Articles 39 and 43, that officers should be "cashiered" by courts martial for certain offenses.

This was followed by the Act of April 23, 1800 (2 Stats., 45), which, in article 41, provided that all sentences of courts martial extending to the dismission of a commissioned or warrant officer must first be approved by the President of the United States, and article 42 conferred upon the President power to pardon or mitigate punishment decreed by courts martial.

The Act of March 16, 1802 (2 Stats., 132), provided for the discharge of supernumerary officers and men of the military establishment, and section 10 thereof provided that the sentences of general courts martial extending to the loss of life, the dismission of a commissioned officer or which shall respect a general officer shall, with the whole of the proceedings, be laid before the President to be carried into execution or otherwise as he shall judge proper.

The Act of April 10, 1806 (2 Stats., 359), contained the

first articles of war established under the Constitution, and provided that no commissioned officer should be "discharged" from the service, but by the act of the President of the United States or by a sentence of a general court martial. This act provided that the officers should be "cashiered," in articles 14, 15, 18, 22, 23, 45, 85, 89, if sentenced by courts martial. In Articles 36 and 83 it is provided that officers might be "dismissed" by courts martial for certain offenses. But article 65 provided that in time of peace sentences of court martial, extending to the loss of life, or the dismission of a commissioned officer, or which either in time of peace or war respected a general officer, should not be carried into execution until the whole proceedings had been laid before the President for his confirmation or disapproval and orders in the case. By articles 65 and 89 the officer ordering a court martial, or the commanding officer, might carry into execution, in time of war, the sentence of a court martial extending to the loss of life or dismission of a commissioned officer, but they might suspend the execution of such sentences "until the pleasure of the President of the United States can be known."

Next, the Act of May 15, 1820 (3 Stats., 582), provided that certain officers specified (including paymasters of the Army, and Navy agents) should hold their offices for four years, "but shall be removable from office at pleasure."

Section 12 of the Act of March 2, 1821 (3 Stats., 615), provided for the "discharge" by the President of supernumerary officers.

The Act of January 31, 1823 (3 Stats., 723), provided that "every officer or agent of the United States guilty of certain specified offenses should be reported to the President "and dismissed from the public service."

The Act of August 23, 1842 (5 Stats., 512), provided for the "discharge" by the President of certain officers of the Army.

The Act of February 11, 1847 (9 Stats., 123), authorized the organization by the President of certain additional troops for and during the war with Mexico and provided for the appointment by the President of the various commissioned officers authorized in the act, and enacted that such officers be "discharged" from the service of the United States at the close of the War with Mexico.

The Act of March 3, 1847 (9 Stats., 184), provided for the appointment by the President, by and with the advice and consent of the Senate, of certain general officers to serve during the War with Mexico. Section 22 enacted that said officers should be "discharged" at the close of the War with Mexico.

The Act of June 16, 1848 (9 Stats., 335), provided that certain officers commissioned for the War with Mexico shall be "discharged" from the service upon the restoration of peace by a treaty of peace duly ratified and proclaimed.

The Act of February 28, 1855 (10 Stats., 616), provided for the "reserved" list (afterwards called "retired") list of the Navy. This act declared that officers examined and found to be incapable should be "dropped" from the rolls or placed on the "reserved" list upon the approval by the President of the report of an examining board provided for.

The Act of July 17, 1862 (12 Stats., 594), provided for the retired list of the Army and the *modus operandi* of retiring Army officers by the President upon reports of boards provided for. Section 17 of said act authorized and requested the President to "dismiss and discharge" any officer of the Army, Navy, Marine Corps, or volunteer force "for any cause which in his judgment either renders such officer unsuitable for, or whose dismission would promote, the public service.

By Section 12 of the Act of March 3, 1865 (13 Stats., 489), it was provided that "in case any officer of the military or naval service who may be hereafter dismissed by

authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public may permit, convene a court martial to try such officer on the charges on which he was dismissed. And if such court martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court martial aforesaid shall not be convened for the trial of such offense within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

The act of July 13, 1866 (14 Stats., 90), expressly repealed Section 17 of the Act of July 17, 1862, *supra*, and enacted that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court martial to the effect of in commutation thereof."

The Act of July 20, 1868 (15 Stats., 125), provided that no officer of the Army of the United States who has been or shall hereafter be cashiered or dismissed from the service by the sentence of a general court martial formally approved by the proper reviewing authority shall ever be restored to the military service except by a reappointment confirmed by the Senate of the United States.

The Act of July 15, 1870 (16 Stats., L., 315), provided that supernumerary officers shall be "discharged" by the President; authorized him to place on the retired list on their application any commissioned officer who had been thirty years in the service; authorized him to "muster out" of the service officers found to be unfit for service by an examining board provided for; and authorized him to "drop from the rolls" for desertion any officer absent from duty three months without leave. And also enacted that any officer on the active list accepting or exercising the functions of a civil office "shall at once cease to be an

officer of the Army and his commission shall be vacated thereby.

The Act of June 22, 1874 (18 Stats. L., 191), provided that officers of the Navy dismissed and restored under the 12th section of the Act of March 3, 1865, *supra*, shall not be paid more than six months' salary during the period of their dismissal unless they have applied for restoration as often as every six months.

The Revised Statutes of 1878 re-enacted with modifications many of the provisions of the foregoing statutes. The President may drop from the rolls for desertion an officer who is absent from duty three months without leave (Section 1229); the President may retire an officer duly found to be incapable of performing the duties of his office or who has served forty-five years as a commissioned officer or who has attained the age of sixty-two years (Sections 1244-1245). The President may dismiss for various offenses pursuant to, or in mitigation of, the sentences of court martial (Section 1342, Articles 3-6-13-14-15-18-19-26-38-54-60-61-65-99-100-106-107-111-112). In time of war the dismissal of an officer pursuant to the sentence of a court martial may be executed by the commanding general in the field (Section 1342, articles 106 and 107) except in the case of a general officer (Section 1342, article 108). But such commanding officer may suspend the sentence until the pleasure of the President is known (Section 1342, article 111). In time of peace no officer shall be dismissed except upon and in pursuance of the sentence of a court martial to that effect, or in commutation thereof (Section 1229). Any officer dismissed by authority of the President may apply for a court martial, and unless the President shall convene a court martial within six months from the filing of such application, or the court martial, if convened, shall award dismissal or death, the sentence of dismissal is void (Section 1230). But no officer dis-

missed by the sentence of a court martial formally approved by the proper reviewing authority shall be restored except by a reappointment confirmed by the Senate (Section 1228). No officer may be placed upon the retired list except upon his own application, or by reason of having attained the age of sixty-two years, or by reason of having served forty years, nor may an officer be wholly retired from the service for any reason, unless he is first given a full and fair hearing before an Army retiring board, if he demands it (Section 1253).

Since the revision of the Statutes in 1878 the President has been authorized to "drop from the rolls" any officer who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction. And it has also been provided that no officer, dropped from the rolls by reasons of absence from duty without leave (Act of 1870, *supra*), or because of such conviction shall be eligible for reappointment (Act of Jan. 19, 1911, 36 Stats. L., 894) The Act of April 25, 1914 (38 Stats. L., 347), providing for the raising of volunteer forces of the United States, enacts that officers and men composing such volunteers shall be "mustered out" of the service as soon as practicable after the President shall issue a proclamation announcing the termination of the war. The Act of June 3, 1916 (39 Stats. L., 166), provides for "provisional" appointments which, under certain circumstances, terminate after two years. The Act of August 29, 1916 (39 Stats. at L., 651), re-enacted, with some changes, Section 1342 R. S. (the Articles of War). The Act of May 18, 1917 (40 Stats. at L., 76), provided for "temporary promotions," "temporary" and "provisional" appointments, and enacts that "provisional appointments" shall terminate whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fit-

ness requisite for permanent appointment. And the President is authorized to "discharge" any officer from the office held by him under such temporary or provisional appointment for any cause which in the judgment of the President would promote the public service; and the General commanding any Division and higher tactical organization or territorial department is authorized to appoint military boards to examine into and report upon the capacity, qualifications, conduct and efficiency of any commissioned officer within his command (other than officers of the Regular Army holding permanent or provisional commissions therein). If the reports of such boards are adverse and are approved by the President the officers shall be "discharged" at the discretion of the President.

The Revised Statutes contain provisions relating to the officers of the Navy which in a general way are similar, but are not identical, with those relating to the Army (Sections 1443-65 and 1624, R. S., U. S.). In this connection attention is particularly invited to articles 36 and 37 of said Section 1624.

So far as civil officers are concerned, the first Congress of the United States, in 1789, in acts providing for the Department of Foreign Affairs, the War Department and the Treasury Department, authorized the President to remove from office the Secretaries of said Departments. Acts July 27, Aug. 7, Sept. 2, 15, 1789, 1 Stats., pp. 28, 48, 65, 68. It has been claimed that these statutes are important as a construction by Congress of the Constitution and concede the power of removal to be in the President; but however that may be, the opinion of that Congress was of no greater force than the opinion of any other Congress and it is the courts and not Congress which are charged with the duty of construing the law. A construction by Congress is not a judicial determination.

In the Act of May 8, 1792, Congress authorized the

President to select some one to fill temporarily the offices of any of said Secretaries of Department in the event of death or because of sickness, and by the Act of July 13, 1795, this authority was extended to permit the President to appoint temporarily in cases of removal or at the expiration of the term of office (which had not been provided for in 1792). The law remained thus until the Act of March 2, 1867 (14 Stats., 430), which deprived the President of the power of removal of any civil officer appointed by and with the advice and consent of the Senate, and limited his authority to suspension during a recess of the Senate until the next session thereof. That law provided that in the event the Senate refused to consent to such suspension the officer so suspended would forthwith resume the functions of his office. That act was modified by the act of Congress approved April 5, 1869, (16 Stats., 6), which provided, as follows:

> "That every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

These acts were incorporated in the Revised Statutes as *Sections 1767 and 1768*, which remained the law until the Act of March 3, 1887 (24 Stats. L., 500). Since then, by the Act of August 24, 1912 (37 Stat. L., 555), Congress has enacted that no person in the classified civil service of the Government shall be removed therefrom except for cause, and requires that a person whose removal is sought shall have notice of any charges pre-

ferred against him and be allowed a reasonable time for answering the same.

A constitutional power is not limited unless by the Constitution itself. If Congress could limit, prescribe or regulate the exercise of any power granted to the President by the Constitution, it could utterly destroy that power, and its enactments, instead of the Constitution, would be the supreme law of the land. None of the many statutes referred to above has been declared to be unconstitutional, and their various provisions, prescribing, limiting, curtailing and at times altogether denying to the President the power to remove an officer, are all utterly inconsistent with any claim of constitutional power of removal in him.

There are several cases in which the President has removed civil officers, and his action was acquiesced in by the Senate, and the Courts have sustained the legality of his action. The President's order of removal in such a case is the initiation of his exercise of power in an attempt to supersede an officer, under the implied power incident to the power of appointment. Congress would initiate its attempt to accomplish the same result by impeachment proceedings. The result is finally consummated when the President and Senate concur in the appointment of the successor to said officer. It has also been stated in several decisions of this court that *in the absence of a statute*, the President has power to remove an officer. See Parsons vs. United States, 167 U. S., 324. This is true, for it is logical that the President, who takes the initial act (nomination) in the appointment of an officer, should also take the initial step in the superseding of an officer. But Congress, as shown elsewhere in this brief, has repeatedly regulated and sometimes entirely denied to the President any such provilege, which is inconsistent with any claim of power independent of congressional grant, and whatever might be the President's power, in the ab-

sence of statute, such a situation did not exist with reference to officers of the U. S. Army when the President dismissed appellant, for Section 1230, Revised Statutes, prescribed and limited his power in such a case, and under the state of facts as presented in the case at bar, the order of the President was void by the terms of the Statute.

Moreover, the dismissal of an officer of the Army is not merely a *removal* or superseding one officer by another officer. When used in connection with officers of the Army or Navy the word *dismissed* implies a punishment meted out for some offense, as contra distinguished from *discharge* which does not imply that the officer is guilty of wrongdoing. It has to do with the *punishment*, not merely the tenure of office of an officer of the Army, and hence the provision in Section 1229, that in times of peace it may not be ordered in any case except upon the sentence of a court martial, and the provision in Section 1230, that in time of war an officer summarily dismissed may have a trial by court martial before it is finally effective. It is therefore considered that to sustain the President's power to dismiss an officer of the U. S. Army the court should be satisfied that the Constitution and laws give the President the power to mete out that punishment to an officer of the U. S. Army in his discretion without any recourse to the officer. But the Articles of War do not allow such a punishment except for certain specified offenses, and the various statutory enactments referred to above are inconsistent with a claim of power in the President to even discharge an officer.

Nevertheless the various sections of the Constitution to which such a power has been referred in the decision of the court below, will now be severally examined.

7. THE PRESIDENT ALONE HAS NO CONSTITUTIONAL POWER TO DISMISS AN OFFICER AS AN INCIDENT OF THE

The Court below erred in holding that the President had such a constitutional power. (Transcript, page 7).

The contingency under which an officer may be removed from office is one of the elements which enter into the question of his tenure of office.

The only power of removal specified in the Constitution is that contained in Article I, Section 3, Clause 6, which provides that the Senate, by its verdict of guilty, may remove the President, Vice-President, or other civil or judicial or legislative officers who may be presented by the House of Representatives to the Senate for trial for impeachment.

In Section 1 of Articles II and III of the Constitution the tenure of office of the President, the Vice-President and the Judges of the United States Courts are fixed. The Constitution is silent as to the tenure of office of every other officer. The judiciary hold during good behavior, but who can determine the good and bad behavior of a judge, and who has ever attempted to do so except Congress? So far as the Constitution is concerned, the above are the only limitations upon the subject of controlling official tenure. The Constitution being silent as to all other officers, the whole power is vested in Congress to provide for both appointment and removal.

The necessity was recognized by the first Congress of providing a practicable and expeditious method of making necessary and proper changes in the personnel of civil officers. And the exercise of that power has been referred in judicial decisions to the power of appointment, where Congress has not otherwise provided.

The second clause of the second section of Article II of the Constitution provides that the President shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors * * * , Judges of the Supreme

Court and all other officers of the United States except as otherwise provided. And in the same section it is provided that Congress may vest the appointment of inferior officers in the President alone, in the courts, or in the heads of Departments; and that the President shall have power (not to make *appointments*) but to "fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of the next session."

In the first place it will be noted that so far as this clause is concerned the grant of power to the President in the matter of judicial officers is as complete as in the case of any other officers, but it has never been claimed that it conferred upon him the power to remove any judicial officers. And it will be noted that he is clothed with a qualified right to make appointments during a session of the Senate only after confirmation by that body. His only exclusive right is to fill vacancies temporarily which may happen during the recess of the Senate.

Considering this section, it is clear that the first step in the matter of appointment is given to the President to "nominate." The appointment is still inchoate. The next step is the concurrence of the Senate by confirmation and it then becomes the duty of the President to issue the commission. In the case of *Marbury vs. Madison* (*1 Cranch, 137, 156*) it is distinctly stated to be the opinion of the court (*dictum*) that the President could not withhold a commission from an officer nominated and confirmed. In some of the opinions of the Attorney General referred to in the decision in the Blake case, *supra,* there was apparently the failure to recognize the distinction between a ***nomination*** and an ***appointment.*** This section does not confer upon the President the power to *"appoint."* His exclusive power is only to nominate, and when the Senate concurs, and not till then, he is empowered to appoint, and in doing this he

exercises merely ministerial duty in carrying out the previously determined will of the two necessary parties to the appointment. In exercising the power to nominate, the President has discretionary power. In exercising the power to confirm, the Senate has discretionary power. When these two powers have been exercised, the President has no authority but to appoint, and if the power of removal is implied from this section, the concurrence of the Senate in the removal is to be implied as truly as is the power of the President, which is derived solely from his power to nominate. It is well established by judicial decisions that with the concurrence of the Senate the President may remove an officer. Some of these decisions are referred to in the decision in this case. (Transcript, page 8). In each of them it has been held that the officer was superseded where the President nominated the new appointee *vice* the incumbent removed, and the Senate concurred in the nomination, *vice* the incumbent removed.

If the power of removal is an incident of the power of appointment, the appointment cannot be revoked, or the officer be removed, but by the concurrence of the same wills that act in the appointment. The revocation must in point of authority be co-extensive with the authority that grants.

To say that one of two joint constituents can undo an act which it requires both to do, is to give one the power of both which is a contradiction in terms; for an act which requires the concurrence of two parties cannot be undone by one of them without yielding to the one the power of both, which is absurd. The Senate might as well assume to appoint without the consent of the President as the latter to appoint without the consent of the Senate. And conversely, the Senate might as well assume to remove without the consent of the President as the latter to remove without the consent of the Senate. As to officers of the Army, since they are required to be nominated by the Presi-

dent and confirmed by the Senate, it logically follows that the President might at any time nominate to the Senate a person to fill a particular office, and the Senate in the exercise of its constitutional power could confirm that nomination, and that the person so nominated and confirmed would have a right to take and enjoy the office to which he had been so appointed, and thus to dispossess the previous incumbent. It is apparent that no removal can be made unless the President takes the initiative, and hence the expression "removal by the President." It is manifest also that the power of removal is not vested in either the President or Senate or both as an independent power, but it is a consequence of the power of appointment. And as the power of appointment is not vested in the President, but only the right to make a nomination, which becomes an appointment only when the nomination has been confirmed by the Senate, the power of removal cannot be deemed an executive power solely, within the meaning of the Constitution.

The provision that the President may fill vacancies "that may happen during the recess of the Senate" and then only until the end of the next session would seem to deny him the power to fill any vacancies other than those which *happen* during a recess of the Senate. The power is to fill a vacancy, not to create one, and it is a limited power, inasmuch as, when exercised, the authority of the officer designated to fill the vacancy expires at the end of the next session of the Senate. Certainly a vacancy created by the act of the President under this grant of power could extend no longer than the term for which he could fill the vacancy created. If the Constitution had intended in this clause to grant to the President the power of removal it would have used appropriate terms and not limited the power to temporarily "fill such vacancies as may *happen*." A vacancy does not "happen" when it occurs by the act of the President. *Expressio unius est exclusio alteris.*

While it is contemplated by the Constitution that the President shall take the initial step in the removal of an officer, because he takes the initial step in the appointment of one, and the power of the Senate is to concur in or dissent from his proposed appointment or removal, it is the action of the Senate in either case which determines the status of the officer. The *crux* of a case, so far as this doctrine is concerned, is the concurrence of the Senate in the appointment or removal of an officer. In the *Blake* case (*supra*) and other cases which follow the doctrine therein enunciated, it was considered that when the President had nominated an officer, *vice* a second officer removed, and the Senate had confirmed the appointment of the officer nominated *vice* the said second officer removed, there had then been such action as warranted the court in holding that the President, by and with the advice and consent of the Senate had legally superseded the incumbent by the appointment of another officer in his stead. In the *Shurtleff* case (*supra*) the fact existed, but its significance was not recognized. In all of those cases there was the asserted intention by the President to replace a particular person in a particular office by another particular person, and the Senate concurred in the appointment of a particular person to a particular office in the place and stead of a particular person. Inasmuch as in each of those cases the Senate acquiesced in the removal of the officer who was superseded, none of the cases decides that the President *alone* could remove an officer. It is not believed that there are any cases in which the President has removed an officer (either civil or military) without the concurrence of the Senate. In a notable case President Andrew Johnson attempted to remove the Secretary of War, contrary to the will of the Senate, with the result that he was impeached by the House of Representatives and tried by the Senate, which did not remove him, but Congress did thereupon proceed to strip the Presi-

dent of all his power to remove civil officers except to *suspend* an officer during a recess of the Senate. Said restrictive provisions were embodied in the Revised Statutes as Sections 1767 and 1768, and remained the law until the act of March 3, 1887 (24 Stats. at L., 500).

Moreover, it follows logically that an officer once removed from his office cannot be returned thereto without the concurrence of the same wills which were necessary to effect the removal.

If the President alone could remove from office, he could undoubtedly revoke the removal. And this court has held more than once that an officer once completely separated from the service cannot be restored except by the same authority which is necessary for an original appointment.

Mimmack vs. United States, 97 U. S., 426.
United States vs. Corson, 114 U. S., 619.

8. AN OFFICER IS NOT SUPERSEDED WHERE, AS IN THE CASE AT BAR, THE SENATE FAILS TO CONCUR IN THE APPOINTMENT OF HIS SUCCESSOR.

The Court below erroneously held in this case that the President having ordered the dismissal of Colonel Wallace, and the Senate having concurred in the nominations of Smith and Scofield, and there being no other vacancies in the grade of Colonel, therefore it is to be assumed that Colonel Wallace was superseded by one of them, though the findings of fact show that Colonel Wallace was not even referred to in either the nomination or confirmation of Smith or Scofield, and there is no finding of fact that the Senate was even informed of the dismissal of Colonel Wallace. (Transcript, pp. 5, 8.)

While it is clear that the President and Senate may supersede an officer, independent of Section 1230, under the constitutional power of removal as incident to the power of appointment, the Court below entirely missed the vital consideration involved in the doctrine, which is that the power

of appointment being in the President and Senate, it is manifest that the President may, if the Senate concurs, remove any officer whom they jointly have the power to appoint. In this case, however, the record fails entirely to show that the Senate was ever informed that the President had removed Col. Wallace or desired its sanction to his removal, or that the Senate ever did concur in his removal, or that any one has ever been nominated or confirmed in Wallace's place. The Court states that "assuming that the effect of the appointment of Col. Smith was to displace the plaintiff." That is a very violent assumption. The President has never stated that he appointed Smith to displace Wallace, nor has the Senate ever stated that Smith was confirmed to displace Wallace.

The nominations of Smith and Scofield on March 1, 1918, were merely to be Colonels, Quartermaster Corps. The validity of those nominations depends upon the fact that there were two vacancies. **The nominations did not specify any particular vacancies and did not aid in any way in creating any vacancies.** Who can say which of the two men was nominated to succeed Colonel Wallace? And if it is not shown which one was to succeed him, how can it be maintained that either one of them was nomniated to succeed him? There is no finding of fact that the Senate knew that either Smith or Scofield was nominated to succeed Colonel Wallace, or that the Senate knew that the President had dismissed Colonel Wallace or that the Senate concurred in the dismissal of Colonel Wallace or that the Senate consented to any appointment in his place or stead.

We may assume that when Smith and Scofield were nominated, it was not known by the President whether or not Colonel Wallace would apply for a trial by court martial, and the failure to nominate any officer **vice Hamilton**

S. Wallace, dismissed, may have been for the reason that it was known that he was entitled to a reasonable time within which to exercise his statutory right to apply for trial by court martial. In the event that his dismissal was not accomplished there would have been only a temporary excess of Colonels until the next vacancy occurred—in that grade. Such a situation is not unique, and does not in any event affect the status of the *de jure* officer, who, in this case was Colonel Wallace. The supernumerary officer is a *de facto* officer during such period.

Quackenbush vs. United States, 177 U. S., 20.

Rasmussen vs. Commissioners, 45 L. R. A., 295.

Moreover, it was not until February 5, 1919, six months after Colonel Wallace had been refused a court martial, that he was entitled to be restored to his office, and there is no finding of fact here that the complement of Colonels was full at that time. Several vacancies may have occurred between the time of the appointment of Smith and Scofield and the date when the order of dismissal of Colonel Wallace became void under the Statute.

9. NOR HAS THE PRESIDENT ANY IMPLIED AUTHORITY TO DISMISS AN OWNER UNDER HIS CONSTITUTIONAL POWER AS CHIEF EXECUTIVE.

The decision of the Court below quotes from an opinion of Judge Loring in *McElrath's Case* (12 C. Cls., 201) to the effect that in addition to the constitutional power of removal as incident to the power of appointment, the Presiden has power to remove as an "attribute of the executive power belonging to his office." (Transcript, page 7.)

Article II, Section 1, Clause 1, of the Constitution provides that "the executive power shall be vested in the President," and Section 3 of the same article provides that he "shall take care that the laws be faithfully executed." However, if his power and duty to execute the law includes

the power to remove an officer, why does it not also include the power to create an office? He cannot add a soldier to the Army or a messenger to his office unless the power is conferred upon him by Congress. Yet he cannot execute the laws without soldiers and assistants. **His general power to execute is subordinate to his duty to use only those agencies and methods prescribed for him by Congress, which in Article 1, Section 6, Clause 18, of the Constitution is clothed with the power to provide means for the exercise of all the powers conferred by the Constitution upon the executive and judicial branches of the Government as well as upon the legislative branch.**

(See *McCulloch vs. State of Maryland*, 4 Wheat., 316, 409, 420.)

Moreover, we are met at once by the fact that there is in the Constitution a provision for the removal of the executive officers for cause, but it is vested in the House of Representatives and Senate by impeachment, and is not vested in the President. Certainly if it had been intended to give arbitrary power to the President to remove officers without cause, the power to remove for cause would also have been lodged in him. It is clear that the Constitution conferred upon Congress the power of controlling executive appointments and though the judicial branch was clothed with power to adjudicate all other questions arising under the Constitution, the question whether an officer of the United States should be removed from his office for malfeasance or misfeasance was referred to neither the executive nor the judicial branch, but to the Senate, which is thereby constituted a court. And its power is not limited, even to the removal of the Chief Executive of the nation. It may therefore be concluded that there is no *implied* power to be derived from the power to execute the law. And so far as we have been able to discover there has never arisen a case in which the President has suc-

ceeded in removing an officer contrary to the will of the Senate.

10. NOR HAS THE PRESIDENT AUTHORITY TO DISMISS AN OFFICER BECAUSE OF THE TERMS OF THE COMMISSION ISSUED TO SUCH OFFICER.

The Court erred in holding that the President could remove Col. Wallace because claimant's commission ran "To continue in force during the pleasure of the President for the time being." (Transcript, page 7.)

The form of commission to be issued under the Constitution has never been prescribed. Under the power of appointment the initial step in superseding an officer must be taken by the President because the power of nominating the successor is conferred upon him and only the power of concurrence is conferred upon the Senate. Therefore, so far as we have been able to discover, all commissions issued under the Constitution to Presidential appointees have been in the form issued to this claimant, except those issued to the judiciary, those issued in cases where the Congress prescribed the tenure of an office to be for a term of years, and certain commissions to civil officers following the enactment of the Act of March 2, 1867 (*supra*).

The law under which the appointment is made, and not the commission, determines the tenure of office. Nor should the commission of an officer be confused with the appointment itself, for it has been held that the commission is only evidence of the appointment and that it is possible to appoint an officer without issuing any commission. If the commission controlled, then the officer would be entitled to his office notwithstanding his removal by the Senate under its power of impeachment, and the President might by appropriate terms in the commission change the tenure of an office and prevent the removal of an officer by his successor and the Senate even by impeachment. The

propriety of commissioning an officer during the pleasure of the President has never been objected to, nor has it been held by the Supreme Court that it controlled.

To hold otherwise would make the commission superior to the law under which the commission is issued.

Marbury vs. Madison, 1 Cranch, 137.
United States vs. Kirkpatrick, 9 Wheaton, 720.
United States vs. LeBaron, 19 Howard, 74.

11. NOR HAS THE PRESIDENT ANY AUTHORITY TO DISMISS AN OFFICER BY VIRTUE OF HIS CONSTITUTIONAL RELATION OF COMMANDER-IN-CHIEF OF THE ARMY.

There is only one other power conferred upon the President by the Constitution, to which could be referred any implied authority to remove an officer of the Army, and that is his power as Commander-in-Chief of the Army and Navy under Article II, Section 2, Clause 1. Attorney General Legare (*4 Opp. Atty. Gen., page 1*) refers to this supposed implied power in an opinion quoted with approval in certain *dictum* in the *Blake case, supra.* But while Attorney General Legare was of the opinion that such a power existed, he did not approve of it at all as shown by the following from said opinion:

> "That the power is a tremendous one, and that, if tyrannically exercised, none can be imagined more intolerable and more revolting to a free people are propositions which all will admit. That brave and honorable men, such as alone are worthy of a military commission, should be subjected to a capricious despotism, which may not only deprive them of their profession, but even sully their good names, must be felt to be a case of very peculiar hardship. Yet these considerations have not prevented nations jealous of their rights, and earnest in upholding and enforcing their laws against all prerogatives from acknowledging the necessity of such a power in the Commander-in-Chief

of their Army and Navy."

It must be a source of gratification and satisfaction to this Court that there is not a single decision of a court of the United States in which the power of the President as Commander-in-Chief, or otherwise, to remove an officer of the Army or Navy, contrary to the expressed wish of the Senate, has been drawn in question, and manifestly if the Senate concurs in the removal of an officer by the President, as has frequently happened, the cause is at once removed from the class of acts which are to be referred to the exercise of power by the President alone. Attorney General Legare apparently overlooked the Fifth Amendment of the Constitution and the acts of Congress establishing courts martial and prescribing for what offenses officers of the Army and Navy might be removed from their offices, and limiting and prescribing the power of the Commander-in-Chief along with every other officer of the Army and Navy, in the punishment of those engaged in the military and naval service. Every act of Congress limiting the removal of officers is either unconstitutional or the President as Commander-in-Chief has no such implied constitutional power.

Moreover, it is for Congress to decide, in the first place, whether there shall be an Army or Navy, and the President must command the Army or Navy as it is created by Congress, and subject, as is every other officer of the Army and Navy, to such rules and regulations as Congress may from time to time establish.

If the Commander-in-Chief of the Army and Navy had the power to remove, at pleasure, officers of the military and naval service, it would in effect make those organizations creatures of his will, and it would swallow up and overshadow all the power expressly conferred upon him. The possibilities involved in the exercise of such power would be greater and more dangerous than all of the execu-

tive authority expressly granted to the President by the Constitution. But as a matter of fact, the Commander-in-Chief cannot transfer an officer of the Army to the Navy, promote or retire an officer, nor add a soldier to the Army or a sailor to the Navy. He may not increase nor decrease the compensation paid to any one in either branch by virture of any of his authority as Commander-in-Chief. In 1862, when a very large proportion of the officers of the Army and Navy were disloyal and the very integrity of the United States was thereby threatened, Congress authorized the President to dismiss officers from the Army for any reason deemed sufficient by him, **but before that war was over the power was withdrawn from him** and it was never conferred upon him during any other period of the country's history since the adoption of the Constitution.

11. Conclusion.

It follows from the foregoing that the Court erred in its opinion that Section 1230, R. S., does not affect the office held by the dismissed officer or entitle him to its emoluments, and in its conclusion of law that the claimant is not entitled to recover and his petition ought to be dismissed.

Section 1230 relates exclusively to the office and emoluments of office in cases within its purview, and we have shown above that the case of appellant is completely covered by the statute. Indeed the statute admits of no construction which applied to the facts in this case would result otherwise than in restoring the appellant to his office and the emoluments thereof.

The decision of the Court, therefore, must be in favor of the appellant and he is entitled to a judgment for the amount set forth in his claim as found in finding of fact number VII.

This case is analogous to those cases in which officers have for any reason been illegally removed. As appellant's dismissal was void, he has never been lawfully removed,

and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

United States vs. Wickersham, 201 U. S., 390.
United States vs. Redgrave, 116 U. S., 474.
United States vs. Perkins, 116 U. S., 483.
Beuhring vs. United States, 45 Ct. Cl., 404.
Lellman vs. United States, 37 Ct. Cl., 128.
Fitzsimmons vs. City of Brooklyn, 102 N. Y., 536.
Garvey vs. City of Lowell, 199 Mass., 47.
Rasmussen vs. Commissioners, 45 L. R. A., 295.

Respectfully submitted,

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